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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

HENRY J. WILLINGHAM, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA, ET AL., PETITIONERS

v.

HOME OIL MILL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Henry J. Willingham, Collector of Internal Revenue for the District of Alabama, original defendant, as revised against K. T. Tyree, E. L. Deal, and E. N. Hamil, as executors of the last will and testament of Henry J. Willingham, deceased, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit, entered April 7, 1950, affirming the judgment of the District Court.

OPINIONS BELOW

The opinion of the District Court (R. 127-129) is reported at 86 F. Supp. 568. The opinion of the Court of Appeals (R. 143-145) is reported at 181 F. 2d 9.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1950 (R. 145). On July 1, 1950, Mr. Justice Burton extended the time within which this petition might be filed to and including September 4, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Whether a business corporation carrying on competitive commercial activities for profit becomes exempt from federal income tax under Section 101(6) of the Internal Revenue Code by reason of the transfer of its stock to an organization which is tax exempt.

2. Whether the Collector is barred from challenging taxpayer's claim to tax exemption by reason of a judgment in a prior suit between the parties involving a different taxable year.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*, pp. 8-10.

STATEMENT

The facts found by the District Court (R. 127) were as stipulated by the parties. The material

facts set forth in the stipulation (R. 28-36) and the exhibits thereto (R. 37-84) may be summarized as follows:

Taxpayer is an Alabama corporation organized in 1912. Throughout its existence, including the taxable years here involved, it has engaged in the business of processing and selling cotton seed crude oil in competition with like commercial corporations. In 1936, all of its stock was owned by W. R. Spight, who died in that year. (R. 34, 59-62.)

By his will, Spight bequeathed the residue of his estate, including the stock of taxpayer-corporation, to the "W. R. Spight Religious and Charitable Trust" (hereafter called the "trust") for the benefit of eight named religious and educational institutions. The trustees were empowered in their discretion to continue to operate any business forming part of the trust estate for a period not exceeding one year from the date of death of the testator's sister, and the sister was named chairman of the trust for her life at an annual salary of $15,000. (R. 42-53.) Each beneficiary of the trust was a charitable, religious, or educational institution, and the trust is exempt from tax on its income (R. 32). In 1940, the executrix conveyed to the trust all of Spight's residuary estate, including all of taxpayer's stock (R. 32-33). In 1941, taxpayer's charter was amended so as to decrease its author-

ized capital stock to the number of shares then outstanding, to limit its stockholders to tax exempt organizations, and to provide that its purpose was to produce income for tax exempt organizations (R. 33, 66-81). The original provisions of taxpayer's charter, authorizing it to carry on all of the commercial activities of a processor and vendor of cotton seed oil (R. 59-60), were left intact.

During its fiscal year ending July 31, 1943, taxpayer had a net income for income and excess profits tax purposes of $71,793.64, of which it paid total dividends of $15,000 to the trust. During its fiscal year ending July 31, 1944, it had a net income of $19,871.46, of which it paid total dividends of $3,000 to the trust. (R. 34-35.) It had an earned surplus at the beginning and end of its 1943 fiscal year of $242,501.34 and $263,247.59, respectively. By the end of its 1944 fiscal year, its earned surplus had further increased to $281,345.39. (R. 36.) During these years, taxpayer borrowed from the trust and others substantial amounts which it used in its business to purchase raw products for processing (R. 36, 81-84).

Taxpayer filed income and excess profits tax returns for its 1943 and 1944 fiscal years in which it reported a total tax liability of $37,101.57 for 1943 and $4,567.14 for 1944, and it paid these amounts under protest. A post-war refund of $2,007.72 was made to taxpayer for the year 1943. Thereafter taxpayer filed claims for refund of the balance.

The claims were denied, and suit for refund followed. (R. 31-32.)

The District Court, relying upon the majority opinion in *Roche's Beach, Inc.* v. *Commissioner,* 96 F. 2d 776 (C. A. 2d), held that taxpayer was exempt from tax under Section 101(6) of the Internal Revenue Code.[1] It also felt that the Government was estopped from challenging taxpayer's claimed exemption status by virtue of a judgment in a prior suit between the parties involving taxpayer's 1941 fiscal year. (R. 127-129.) The Court of Appeals affirmed (R. 143-145).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that a business corporation carrying on only commercial activities for profit in competition with others is "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes" within the meaning of Section 101(6) of the Internal Revenue Code.

(2) In holding that a conventional business corporation is exempt from tax on its net income under Section 101(6) of the Internal Revenue Code by

---

[1] The *Roche's Beach* case was decided in 1938. Although contrary to the general position theretofore taken by the Bureau of Internal Revenue, the decision was at first accepted by the Treasury as a precedent in other cases involving substantially the same facts. Since 1942, however, the Treasury has refused to follow that decision. See G. C. M. 23063, 1942-1 Cum. Bull. 103.

virtue of the fact that its stockholders are exempt from tax on their net income.

(3) In holding that the Collector is estopped from challenging taxpayer's claim to tax exemption by reason of a judgment in a prior suit between the parties involving a different taxable year.

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari is filed for the purpose of protecting the Government's interests in the event certiorari is granted in *Universal Oil Products Company* v. *Campbell,* No. 159. The petition for a writ of certiorari in the *Universal* case asserts conflict with the decision below. For the reasons pointed out in the Government's answering memorandum, that case turns on its unusual facts, and does not present a square conflict. However, the Government is not opposing the granting of the writ in that case should this Court be willing to go beyond the facts there involved and undertake to decide the basic question of whether an ordinary business corporation becomes exempt from federal income tax under Sections 101(6) and 101(14) of the Internal Revenue Code (Appendix, *infra,* p. 8) merely because its stock is acquired by a tax exempt organization.

If certiorari is granted in the *Universal* case, this Court's decision and opinion in that case may have an important if not decisive bearing upon the disposition of this one. Accordingly, to safeguard

the Government's interests, certiorari is being sought herein. However, since this case is complicated by the collateral estoppel or *res judicata* issue,[2] the immediate granting of this petition might impose an unnecessary additional burden upon the Court. We therefore suggest that, should the Court grant the petition in the *Universal* case, it hold the petition in the present case in abeyance pending the ultimate disposition of that case.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1950.

---

[2] The decision below rests in part on the ground that a judgment exempting taxpayer from tax for a prior taxable year is *res judicata* of its claim to exemption for the taxable years here involved. This holding appears to be in conflict with *Engineers Club of Philadelphia* v. *United States*, 42 F. Supp. 182 (C.Cls.), certiorari denied, 316 U.S. 700, rehearing denied, 317 U.S. 705. See also *Commissioner v. Sunnen*, 333 U.S. 591, 597-602.

APPENDIX

Internal Revenue Code:

SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter—

* * * * *

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * *

(14) Corporations organized for the exclusive purposes of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter;

* * * * *

(26 U. S. C. 1946 ed., Sec. 101.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.101(6)-1. Religious, Charitable, Scientific, Literary, and Educational Organi-

zations and Community Chests.—In order to be exempt under section 101(6), the organization must meet three tests:

(1) It must be organized and operated exclusively for one or more of the specified purposes;

(2) Its net income must not inure in whole or in part to the benefit of private shareholders or individuals; and

(3) It must not by any substantial part of its activities attempt to influence legislation by propaganda or otherwise.

Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily deprive it of exemption.

An educational organization within the meaning of the Internal Revenue Code is one designed primarily for the improvement or development of the capabilities of the individual, but, under exceptional circumstances, may include an association whose sole purpose is the instruction of the public, or an association whose primary purpose is to give lectures on subjects useful to the individual and beneficial to the community, even though an association of either class has incidental amusement features. An organization formed, or availed

of, to disseminate controversial or partisan propaganda is not an educational organization within the meaning of the Code. However, the publication of books or the giving of lectures advocating a cause of a controversial nature shall not of itself be sufficient to deny an organization the exemption, if carrying on propaganda, or otherwise attempting, to influence legislation forms no substantial part of its activities, its principal purpose and substantially all of its activities being clearly of a nonpartisan, noncontroversial, and educational nature.

Since a corporation to be exempt under section 101(6) must be organized and operated exclusively for one or more of the specified purposes, an organization which has certain religious purposes and which also manufactures and sells articles to the public for profit, is not exempt under section 101(6) even though its property is held in common and its profits do not inure to the benefit of individual members of the organization. See section 101(18) as to religious or apostolic associations or corporations.

A corporation otherwise exempt under section 101(6) does not lose its status as an exempt corporation by receiving income such as rent, dividends, and interest from investments, provided such income is devoted exclusively to one or more of the purposes specified in that section.

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No. 257.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

HENRY J. WILLINGHAM, Collector of Internal Revenue for the District of Alabama, et al.,
Petitioners,

vs.

HOME OIL MILL et al.,
Respondents.

MEMORANDUM BRIEF AND ARGUMENT

For Respondents on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CHAS. H. EYSTER,
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No. 257.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

HENRY J. WILLINGHAM, Collector of Internal Revenue for the District of Alabama, et al.,
Petitioners,

vs.

HOME OIL MILL et al.,
Respondents.

MEMORANDUM BRIEF AND ARGUMENT

For Respondents on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW.

Opinion of District Court, Record pages 127-130, reported 86 Fed. Supp. 568.

Opinion Court of Appeals, reported 181 Fed. (2) 9.

JURISDICTION.

Judgment of Court of Appeals was entered April 7, 1950, 181 Fed. (2) 9.

Ex Parte Application and extension of time for filing Petition; time extended through September 4, 1950.

Jurisdiction of Court is invoked under 28 U. S. C., Section 1254 (1).

STATUTES INVOLVED.

26 U. S. C. A., Section 101 (6).

PETITIONER'S STATEMENT AMENDED.

We wish to supplement Petitioner's Statement by adding thereto the following material matters from the Record.

1. **Admissions in Pleadings:**

Paragraph 1 of complaint alleges:

> "Its organization as a corporation by which it **prosecutes** this suit being under its organizational Amended Charter of date July 25, 1941" (R. p. 1),

and Government's answer thereto:

> "The allegations of paragraph one are admitted" (R. p. 15).

2. **No Tax Evasion Intended or Possible:**

> "Mr. Cooper (Government's Trial Attorney): I have not one iota of evidence or the remotest reason myself to think that there is any possibility that there would

be any tax evasion idea in the minds of these people, **or even possible under their setup.** (Emphasis ours.)

"The Court: That is right" (R. p. 110).

* * * * * * *

"Mr. Cooper: I am not going to say that there was any tax evasion motive. I don't know one way or the other. I have no ground.

"The Court: So it would be a fair statement to say in the issue that the defendant does not contend that either in the organization, the formation or the operation of the plaintiff that the tax evasion motive played any part whatsoever. I am not saying that you concede that. I am saying that you do not contend that it did.

"Mr. Cooper: I can't concede it because I don't know any of the facts connected with it. I have no reason to say at this moment that there was anything like that" (R. p. 121).

3. **The Court Affirmatively Finds There Was No Tax Evasion:**

"The Court: Let me make this statement now. I am perfectly willing to find as a fact that the tax evasion did not play any part.

"* * * Mr. Cooper: I don't think so either, your Honor, and I don't know that any mention of it would be made at all. Certainly no contention or argument can be made on the basis of any facts I know anything about.

"The Court: I am going to find that as a fact then and that will foreclose the whole thing" (R. p. 122).

4. **Home Oil Mill Guilty of No Practices of Unfair Competition:**

"The Court: I don't believe that that would be material in this case because there is no **contention**

raised and nothing in the stipulation that tends to indicate, from which an inference could be drawn that by virtue of your exempt status or your claimed exempt status that you engage in unfair competition.

"Mr. Cooper: Not unfair competition, just ordinary business competition" (R. p. 119).

And from the Opinion of the Court:

"The Court further finds that neither in the organization nor in the operation of plaintiff, Home Oil Mill, was the motive of tax evasion even remotely involved. No contention was urged upon this court in behalf of defendants that as a result of its tax exempt status the above named plaintiff occupied a favored position among its competitors in the matter of price differentials" (R. p. 127).

5. **Altered and Amended Charter Provisions:**

Government's statement fails to set out fully the charter provisions of reorganized Home Oil Mill under which this suit is prosecuted. See Record pages 69 to 75 for action of the Board of Directors, and Record pages 75 to 80 for record proceedings of stockholders. The amendment of the Charter, Home Oil Mill, was duly authorized by Alabama Statutes.

6. **Petitioner's Statement Makes an Incorrect Implication:**

The following statement is made by the Petitioner:

"The original provisions of Taxpayer's Charter, authorizing it to carry on all of the commercial activities of a processor and vendor of cotton seed oil (R. pp. 59, 60) **were left intact.**" (Emphasis ours.) (Petitioner's Brief, page 4.)

We think the statement "were left intact" is in error.

See Resolutions of Directors and Stockholders, Record pages 69 to 80; and we particularly call to the attention of the Court, the concluding paragraph of Resolution of the Stockholders:

> "Be It Further Resolved that this instrument shall constitute an amendment to the Charter of said corporation, **and be controlling and directing in its future objects, and purposes, and business.**" (Emphasis ours.) (R. p. 80.)

See also "Findings of Fact," 68 Fed. Sup. 525.

QUESTIONS INVOLVED.

Petitioners seek from this Court a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals, Fifth Circuit, **Willingham, Collector of Internal Revenue, et al. v. Home Oil Mill et al.**, 181 Fed. (2) 9, affirming judgment of United States District Court for the Northern District of Alabama, **Home Oil Mill et al. v. Willingham et al.**, 86 Fed. Sup. 568, because:

(A) The Fifth Circuit applied the well-established principles of collateral estoppel from prior case of same style and parties and Court, 68 Fed. Sup. 525; and

(B) The Fifth Circuit held:

> "If it is possible for a religious, charitable and educational trust to operate an industry through a corporate agency and be exempt under Section 101 (6) of Title U. S. C. A., the appellant (appellee) is entitled to such exemptions" (181 Fed. [2] 10),

following the good faith, bona fide and non tax dodging cases of the Supreme Court of the United States in **Trinidad v. Sagrada Orden**, 263 U. S. 578, 44 S. Ct. 204, 68 L. Ed. 458; **Bohemian Gymnastic Association Sokol of City of**

New York v. Higgins, 147 Fed. (2) 774, Second Circuit, decided March 8, 1945; **Debs Memorial Radio Fund v. Commissioner**, 148 Fed. (2) 948, Second Circuit, decided April 2, 1945, in which last case on April 2, 1945, the Second Circuit Court said it would "continue to do so until instructed otherwise by 'Final Authority'" (meaning unless instructed by this Honorable Supreme Court of the United States), which decision became final, as it was never reviewed on Writ of Certiorari by the Supreme Court; and also following the good faith, bona fide, non tax dodging cases growing out of the very sacred and solemn testamentary dispositions by WILLS, giving all to religious, charitable or educational institutions, through trusts, out of a sincere and philanthropic feeling and heart's desire to promote the causes for which these institutions existed:

Roche's Beach, Inc., v. Commissioner, Second Circuit, decided May 9, 1938, certiorari not attempted, 96 Fed. (2) 776;

Commissioner v. Orton, 173 Fed. (2) 483, Sixth Circuit, decided March 28, 1949;

Home Oil Mill v. Willingham, 68 Fed. Sup. 525, July 1945, decided July 1946, United States District Court, Alabama; appealed and appeal dismissed on Government's motion January 9, 1947, C. C. H. Tax 1950, Index 20627;

Home Oil Mill v. Willingham, 86 Fed. Sup. 568, decided February 1949, United States District Court, Alabama, affirmed 181 Fed. (2) 9.

We believe the Bureau has paid off the above judgments in the three above will cases, and has allowed these institutions future exemptions, except last Home Oil Mill case.

(C) The Petitioner does not urge nor unequivocably, definitely and positively assert a square conflict between the decision of the Fifth Circuit in the Home Oil Mill case

and the decision of the Seventh Circuit in the Universal Oil Company case, nor any other case from this Court or any other Circuit Court of Appeals.

From Petitioner's Brief in the Home Oil Mill case we quote:

> "The petition for certiorari is filed for the purpose of protecting the Government's interest in the event certiorari is granted in Universal Oil Products Company v. Campbell, No. 159" * * * "For the reasons pointed out in the Government's answering memorandum (the Universal Oil case) that case turns on its unusual facts, and DOES NOT PRESENT A SQUARE CONFLICT." (Capitals ours.) Petitioner's Brief, p. 6.

In Case No. 159, **Universal Oil Products Company, Petitioner, v. Nigel D. Campbell et al.**, now pending in this Court on Petition for Writ of Certiorari by Universal Oil Products Company, same counsel, representing respondent in Universal Oil Company case and petitioner in Home Oil Mill case, says, in his memorandum brief in Universal case, opposing granting of Writ, at pages 12 and 13:

> "3. Although the decisions of the courts reflect a diversity of approach, the decision (Universal Oil case) below does not appear to be in **direct conflict with any decisions of this Court or any of the Courts of Appeal**" (Government's Brief in Universal Oil case, page 12). (Emphasis ours.)
>
> "Nor can it be said that **a true conflict is presented** by Willingham v. Home Oil Mill, 181 F. 2d 9 (C. A. 5th), decided after the decision below, and also relied upon by taxpayer (Br. 19, 22). That case was not decided on **its merits alone**, but also on the ground that the Government was estopped from challenging the taxpayer's claim to exemption by reason of a

judgment in a prior suit. Insofar as its merits were concerned, the court assimilated the facts there presented to those in Roche's Beach case and accordingly regarding that case as controlling" (Page 13, same brief). (Emphasis ours.)

Petitioner's case does not present a true conflict with any decision of this Court, nor any other Circuit Court of Appeals, and Trinidad Sagrado, Roche's Beach, Orton and other cases having been decided under and construed a statute which for over thirty years has not been changed, altered or amended, there just does not exist any special and important reason for granting certiorari in this case.

Rule 38, Secs. 5 and 5 b.

THE DEPARTMENT'S REMEDY IS BY LEGISLATION.

"The Court: However, I am convinced that the Congress intended, in writing this exemption, to provide an exemption for a situation entirely like this situation, which is unaffected by a great many of the evils which I know are bound to be in a great many other situations" (R. p. 107).

"I am honest in my opinion that this is a matter **for the legislature and not for the judiciary,** and I am furthermore of the opinion that if it is the view of the department that here is a case that has none of the elements of the tax evasion motive" (R. p. 109).

"Mr. Cooper: Well, the legislative, they have a lot of men up there who are supposed to be professionals at the art of legislative drafting and from what I have been told unofficially in this conference that I referred to a while ago they don't seem to be able to satisfy themselves that they can get at the people they

want **without impairing these charities**" (R. pp. 111, 112).

"The Court: With that factual situation existing and with the Congress devoting its attention to it, I think they are the ones to say what they mean if they did not mean what the Court said they meant" (R. p. 115).

It is my interpretation of the President's Message to Congress and Mr. Snyder's Report to the House Ways and Means Committee that they think the courts have allowed this exemption to corporations like the Home Oil Mill, but Congress is asked by them to pass a Revenue Act which will tax corporations like Home Oil Mill for future years.

COLLATERAL ESTOPPEL.

On July 25, 1945, Home Oil Mill filed its first suit against Willingham, the Collector, for refund of income and excess profits taxes paid by it for its first fiscal year's operations, August 1, 1941 to July 31, 1942, as a reorganized corporation.

This cause was tried in July, 1946, and submitted on the evidence, with the right to each party to file brief.

August 16, 1946, Willingham's attorneys, United States District Attorney and Assistant, and three attorneys out of the Solicitor General's office, filed written brief in Willingham's behalf.

Petitioner makes the contention now that, because a different tax year is involved, the same issues were not before the Court in first above case as in the present case, thereby otherwise admitting that the pleadings, parties, facts and issues, etc., are identical in this present case as in the first

case above, except for dates and amount of taxes paid. The Court reviews its Finding of Fact in first case:

> "The Court: * * * I was just checking back over my Findings of Fact in this former case" (R. p. 101).

The opinion of the District Court very definitely states that the Government, in the first Home Oil Mill case, made the same contentions as the Government is making in this case, and that in the first Home Oil Mill case the Court rejected these same contentions:

> "Heretofore, on July 26, 1945, in an action between these same parties involving the immediately preceding taxable year, this **Court rejected the same contention by defendant.**
>
> "Upon the basis of the findings of fact and conclusions of law, with particular reference to paragraphs four and five of the conclusions of law contained in such decision, plaintiff, Home Oil Mill, **now invokes the doctrine of collateral estoppel.**
>
> "Since I am strongly persuaded to follow the majority opinion in the Roche's Beach case, I put to one side the **question of collateral estoppel by judgment, though I recognize its palpable application to the factual and legal situations obtaining here**" (R. p. 128).

The Government urged the applicability of the Roche's Beach decision in the first case, as is clearly shown by statement of Trial Court:

> "The Court: I think I will say this, Mr. Cooper, for your benefit, that the weight of the majority opinion in the Roche's Beach case was very strongly urged by the Government in the former case. I considered that very carefully" (R. p. 103).

Government's brief, in first case, admitted and argued the legal exempt status of Home Oil Mill, from which brief in first case we quote as follows:

"Index to Brief.

" * * * The potential destination of income is the critical factor..... 5"

2. " * * * Thereafter, and on or about July 26, 1941, the taxpayer was reorganized from an ordinary **profit motive commercial** corporation **into a charitable corporation,** by amendment to the charter in accordance with the laws of the State of Alabama." (Emphasis ours.)

Page 4 of Government's Brief.

3. " * * * In such reorganization of taxpayer, and the attendant amendment of its charter, its board of directors adopted a resolution incorporating the provisions of Section 101 (6) of the Internal Revenue Code **to express the purpose and character of its future operation.** Among such provisions, it provided that all of the net earnings, profits and dividends inuring from the stock of taxpayer shall be exclusively and solely for the benefit of charitable, religious or educational institutions and purposes and not for the benefit of any private shareholder or individual. (Emphasis ours.)

" * * * That is to say, **if the entire income of taxpayer must be** paid to beneficiaries which are religious, charitable or educational institutions enjoying an exemption status, and **no part may go to a private individual, then its operations prove the character of the organization and bring it clearly within the principle announced in** (this emphasis ours) **Trinidad v. Sagrada Orden,** 263 U. S. 578; **Roche's Beach, Inc., v. Commissioner,** 96 F. 2d 776 (C. C. A. 2d); **Debs Memo-**

rial Radio Fund v. Commissioner, 148 F. 2d 948 (C. C. A. 2d); **Bohemian Gymnastic Ass'n Sokol of City of N. Y. v. Higgins,** 147 F. 2d 774 (C. C. A. 2d)."

Government's Brief, pages 5 and 6.

4. Signed:

"Douglas W. McGregor
Assistant Attorney General.

Andrew D. Sharpe,
Mills Kitchin,
Special Assistants to the
Attorney General.

John D. Hill,
United States Attorney.

William H. Burton, Jr.,
Assistant United States Attorney."

Government's Brief, page 11.

Thus, the exemption status of Home Oil Mill under Section 101 (6) was before the Court in the first case, and its exempt status was an issue, and the issue was sanctioned and admitted and not denied by the Government. Certainly, the Government cannot now consistently claim that the issue of the exempt status of taxpayer was not presented in the first case.

The Government in the first case said, in effect, the exempt status of the Home Oil Mill under Section 101 (6) is admitted and no contention is made that it did not qualify for this exemption under its reorganization and operation, having been converted thereby "into a charitable corporation," but the Government contended, being entitled to this exemption, it deprived itself of the right to claim the exemption because it paid a salary to Mrs. Burr.

The Government's attorney in the present case acknowledged that he was asking the Court to overrule the Court's first decision.

> "Mr. Cooper: I am in the unenviable position of asking the Court to overrule itself in a way, while the other case did involve a different point. I think you have considered these different matters perhaps and you probably still feel you want to follow Roche's Beach" (R. p. 113).

There is common to the present case all of the points and issues which were involved and presented in the first case, but in the first case the Government admitted the point which it is denying in the present case, and denied the point which it is admitting in the present case. Both points were presented by the pleadings and evidence in the first case, and the Government admitted the exempt status in the organization and operation of the Home Oil Mill in the first case, but sought to deny the Mill's right to recover by claiming that the Mill paid Mrs. Burr a salary in violation of the provisions of the statute.

The opinion of the Court in the present case shows very definitely that the Court in the first case rejected the issues now insisted upon by the Government:

> "Concisely stated, the defendants contended that plaintiff corporation was not organized and operated exclusively for charitable, scientific or educational purposes, but rather that it operated, during the tax years involved, a competitive commercial business from which all its income was derived.
>
> "Heretofore, on July 26, 1945 (filing date), in an action between these same parties involving the same immediate preceding taxable year, this Court rejected that same contention by the defendants" (Opinion of Court, R. pp. 127, 128).

The Government took an appeal in the first case to the Circuit Court of Appeals for the Fifth Circuit, and on January 9, 1947, this appeal was dismissed. C. C. H. Fed. Tax 1950, Index 20,627.

No Change in "Exemptions From Tax on Corporations," U. S. C. A., Title 26, § 101.

The Trial Court inquired of attorneys whether or not there had been any legislative change in the Exemption Statutes, or of Section 101 (6) thereof, since **Roche's Beach** decision in 1938 (R. p. 88). Attorneys for both parties answered there had been no legislative change, and the Government's attorney then stated there had been no bill proposed to change Section 101 (6) (R. p. 90).

Roche's Beach.

Government's attorney undertook to explain the failure of the Government to petition for certiorari in **Roche's Beach case:**

> "And with that uncertainty together with the fact that the Government is always interested in protecting and furthering charities, they came to the conclusion that the Roche's Beach decision was **perfectly proper,** and they decided it should be followed, and your Honor may or may not know there was entered in **1938, 1939, and again in 1940** official rulings of the Internal Revenue directing its personnel to dispose of cases in the Bureau in accordance with Roche's Beach" (R. pp. 88, 89). (Emphasis ours.)

The Internal Revenue Department having determined in 1938 that Roche's Beach decision was PERFECTLY PROPER (R. p. 89), decided to follow Roche's Beach, and issued rulings directing its personnel to dispose of cases in the Bureau in accordance with Roche's Beach. With no

change in the Exemption Statute, but re-enactment of the Exemption Statute by Congress through repeated sessions, makes the Home Oil Mill case a perfect one for the application of equitable estoppel, even if the first decision of Home Oil Mill v. Willingham, 68 Fed. Sup. 525, had never been rendered, but with the first decision rendered, the present case is a perfect one for application of collateral estoppel.

The Trustees in 1941 knew of the Exemption Statute, and the construction placed thereon by **Roche's Beach case**, and the Bureau's then rulings. It was the duty of these Trustees to so manage, operate, control and organize the properties of the trust and corporation so as to make these properties produce revenue for the beneficiaries of the trust, and they had a right to rely on the Statute, decisions construing the Statute, and the rulings of the Bureau. The Trustees, after mature study and the expense incident thereto, reorganized the Home Oil Mill, and as so reorganized, operated it thereafter so as to be entitled to the exemptions.

Decision of the Trial Court recognized the palpable application of the doctrine of collateral estoppel to the factual and legal situation obtaining in the second trial (R. p. 128), and on appeal, the Fifth Circuit Court of Appeals concurred in and applied the doctrine of collateral estoppel. 181 Fed. (2) 9-10.

The first decision in the Home Oil Mill case, 68 Fed. Supp. 525, appealed to the Fifth Circuit Court of Appeals by the Government, and there dismissed by it, C. C. H. Fed. Tax, and the second trial reported in 86 Fed. Supp. 568, affirmed on appeal, justifies this Court in denying the petition without further consideration.

> "We might put our decision in this case solely upon the doctrine of collateral estoppel since a determina-

tive issue here was necessarily decided by implication against the Government in Home Oil Mill v. Willingham, supra." 181 Fed. 2d 9.

Tait v. Western Maryland Railway Co., 289 U. S. 620, 624, 53 S. Ct. 706, 77 L. ed. 1405, 1408;

Cf. Sealfon v. United States, 332 U. S. 575, 68 S. Ct. 237, 92 L. ed. 180.

UNIVERSAL OIL PRODUCTS COMPANY CASE PRESENTS NO SQUARE CONFLICT.

Opinion in Universal Oil Products Company case from the Seventh Circuit was rendered April 6, and Home Oil Mill case April 7, 1950. The Government made no application for rehearing in the Home Oil Mill case.

In Universal Oil case this question is posed by the Seventh Circuit:

> "The principal question presented by these appeals is the question of whether the plaintiff taxpayer from and after November 29, 1944 was, as the District Court held, exempt under the provisions of Section 101 (6).
>
> "The basic facts concerning this question are not in dispute." 181 Fed. (2) 453.

There are many differences in the amended charter of Universal Oil Products Company and reorganization charter of the Home Oil Mill. When boiled down, the principal differences are these:

(1)

Universal did not amend its articles of incorporation by making Section 101 (6) a part thereof until November 15, 1945, which was one year after the date from which it claimed exemptions, 181 Fed. (2) 462, which the Seventh

Circuit describes as a "belated attempt" to bring itself within the Exemption Statute.

(2)

Both at **the time** of the first amendment in November, 1944, and the second amendment in November, 1945, six major oil companies held and **retained**, under the amendments, irrevocable valuable pecuniary interests in the properties, and therefore in the earnings, of Universal.

(3)

(a) Under the reorganization, the Board of Directors of Universal was expressly authorized and empowered, without the assent or vote of the stockholders, to make, amend and repeal the by-laws of the corporation in any manner not inconsistent with the provisions of the certicate of incorporation.

Excerpts from Universal Oil Products Co. v. Campbell, 181 Fed. (2) 451:

(b) "To determine and direct the use and disposition of the annual net profits of this corporation or of its net assets in excess of its capital, and in particular to determine whether any, and if any, what part of the profits or excess assets should be declared in dividends and paid to the stockholders." Page 456.

Also:

(c) "The directors were empowered and authorized by resolution of the Board, and without any action by the stockholders, to authorize the corporation at any time to issue and sell any shares of its capital stock out of the unissued shares authorized." Page 456.

Also:

(d) The Court: "It is significant to note that when this amendment was made the provisions as to the powers of the corporation and as to the powers of the directors were left in the certificate of incorporation as they had originally been written." Page 456.

(e) Before these amendments were filed, and evidently in contemplation of amending the charter, the by-laws were amended to provide that each director, other than one who was at the time a salaried officer, should receive a fee of $500.00 for attendance at each meeting of the Board not exceeding a total $5,000.00 in any one calendar year, and should also be paid all expenses incurred by his attendance at such meeting.

181 Fed. (2), pages 456 and 457.

(f) After reorganization, Universal continued its vast research and development works, to develop and discover new processes, to obtain patents thereon, etc., to sell licenses to use these patented processes to the smaller independent oil companis, etc., and

> "To permit such use, royalty free, by the major oil companies who held irrevocable licenses or immunity agreements." 181 Fed. (2) 463.

(g) The six major oil companies, at the time of the donation of the stock and notes, provided in the Trust Agreement:

> "(1) That the Trustees
>
> "Shall not 'cause or permit Universal to discontinue research and development work in the petroleum field and the ownership and licensing of processes, patents and patent rights relating to the petroleum field.'" Page 463.

(h) These six oil companies thus provided as a condition of the donation:

> "* * * that the plaintiff should continue to carry on the research, development and patent work in the petroleum field, work which was to be financed primarily by the smaller independent oil companies, work the result of which for years to come **could be used royalty-free by the donors and their subsidiaries.**" (Emphasis ours.) Page 463.

(i) And by the Trust Agreement:

> "* * * the interest of the public was only secondary and that the primary and major interest was for the financial and business advantage of these major oil company donors." Page 463.

(j) The Court holds:

> "Here * * * the entire business of plaintiff was for the business betterment of those engaged in the petroleum industry and especially of the major oil companies who were to receive without cost the benefit of all the plaintiff's discoveries or inventions." Page 464.

Also:

(k) "In the instant case the scientific or educational purposes of plaintiff's operation, instead of being exclusive, was only incidental to the primary purpose of research, development and securing patents in the petroleum field for the benefit of petroleum industry, and particularly for the major oil companies, in order to improve their business, increase their sales, and thereby secure to them greater profits. Resulting benefits to the public were only incidental." Pages 464 and 465.

After making the above findings of fact and law, which the Court states at page 453 "are not in dispute," the Court reaches this conclusion:

> "After consideration of the entire record, we must find and hold that plaintiff was neither organized nor operated exclusively for any of the exempt purposes mentioned in said section." Page 465.

The facts found by the Seventh Circuit to exist in the Universal case are not to be found in the Home Oil Mill case.

The Government's petition and discussion expressly recognize that there is no square conflict between the Home Oil Mill case and the Universal Oil Products Company case, since the reasons for decision in the Universal case were that when the Universal's charter was amended, the six major oil companies held a valuable and irrevocable property right in its patents, developments, research work, etc., and from its operations were to receive substantial pecuniary profits. Thus the profits from Universal's earnings inured to the benefit of the irrevocable holders of an interest in its most valuable property rights, and from these property rights the corporation profits inured to the benefit of the private oil companies.

See Universal's petition for certiorari and discussion.

DOES HOME OIL MILL QUALIFY FOR EXEMPTIONS UNDER SECTION 101 (6)?

It has been held that it does by two prior decisions of United States District Court.

> First Case: Home Oil Mill v. Willingham, 68 Fed. Supp. 525, appeal taken and dismissed by the Government. C. C. H. Fed. Tax 1950, Index 20627.
>
> Second Case: 86 Fed. Supp. 568, affirmed 181 Fed. (2) 9.

Government's Brief filed August, 1946, in First Case (heretofore quoted from) said that **it does.**

The District Court had the case before it in minute detail on first trial, and the Trial Court's "Findings of Fact" as set out in paragraphs 11 to 17, inclusive, thereof states that **it does.** 68 Fed. Supp., at pages 527, 528.

Also the Trial Court's "Conclusions of Law" hold that its reorganization and operation was such as to make it entitled to the exemptions. 68 Fed. Supp., at page 530.

Home Oil Mill's reorganization by altering and amending its charter was fully authorized by the Alabama Statutes:

> "§ 18. (6982) (3462) Changes or amendment of charter and scope of business; how effected.—Every corporation chartered under this title or under any general or special law of this state may change the nature of its business, the par value of the shares of its stock, change the location of its principal office in this state, renew or extend its corporate existence, change its corporate name, and make such other amendment, alteration, or change of its charter as may be desired in the following manner: * * *"
>
> "§ 70. (7015) (3481) (1256, 1248, 1193, 1163, 1103, 1144) General powers of corporations.—Every corporation organized under the laws of this state shall have the following powers, unless inconsistent with the nature, character, or object of the corporation, or unless such powers are expressly denied to the corporation by its charter: * * *
>
> "(13) To alter or amend charter.—To alter or amend its charter."
>
> **Code of Alabama 1940, Title 10, Section 18, Section 70, Section 70, Subd. 13.**

The action of Home Oil Mill's Board of Directors and stockholders was in strict compliance with Alabama Statutes above. 68 Fed. Supp. 525.

For action of directors and stockholders see record pages 66 to 81, inclusive, concluding with the following paragraph:

> "Be It Further Resolved that this instrument shall constitute an amendment to the Charter of said Corporation and be controlling and directing in its future objects and purposes and businesses" (R. p. 80).

These are charter provisions upon reorganization.

Home Oil Mill's amended charter was a complete reorganization exclusively for religious, charitable and educational purposes, and it has ever since been so operated.

> "The stated purposes for which a corporation is organized must be found in its charter."

It is there many times.

Government's answer to complaint admits that no part of Home Oil Mill's net earnings inured to the benefit of any private shareholder or individual, and that no part of its activities are for carrying on propaganda or otherwise attempting to influence legislation.

Board of Tax Appeals, Bureau's published rulings, decisions of Court of Appeals, and decisions of this Court say IT DOES.

Sand Springs Home, 6 B. T. A. (198) (1927);
Union School of Christianity, 4 B. T. A. (61) (1926);

and Commissioner's acquiescence in both of these decisions.

C. B. (VI-I) 5, 6 (1927).

"This view was expressed by the Income Tax Unit of the Bureau as reported in I. T. 1945, C. B. III-1, p. 273: 'A corporation formed to dispense charity which does not actually engage in charitable undertakings itself but distributes its income to institutions organized and operated exclusively for the purposes named in subdivision (6) of section 231 is exempt from taxation under said section.' "

Roche's Beach, Inc., v. Commissioner of Internal Revenue, 96 F. 2d 779.

Court Decisions Used in This Brief.

The Statute, Section 101 (6), by the use of the words "NET EARNINGS" intended for corporations to have "NET EARNINGS" from its operations, and when organized for the purposes, objects and business exclusively of religious, educational and charitable purposes, all of its properties being owned exclusively by such institutions, and can never be owned by others, and when all of its "NET EARNINGS" belong to such institutions, and when not one penny can ever go to or inure to the benefit of any private shareholder or individual, and when there can be no private shareholder or individual holder of its stock or its assets under its charter, such corporation is entitled to the exemption. The Statute says **it does.**

OBJECTIONS TO DELAY.

Respondent earnestly protests and objects to the suggestion of Petitioner's counsel that consideration of its Petition in this case be held in abeyance.

Respondent has been contending for the establishment of its rights on this matter since July, 1941, and has clearly established its right by the decisions for its first fiscal

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year, August 1, 1941 to July 31, 1942, where the Government recognized the principles for which Home Oil Mill is now contending and paid this first judgment off, after appeal to the Circuit Court of Appeals was dismissed by the Government.

The Government in suit case failed to file its Petition within the usual ninety days and obtained a sixty-day extension, most of which it used, and now seeks a further delay because of the existence of a case before this Court which factually and in principle is entirely different from the Home Oil Mill case.

Home Oil Mill has had more than its share of aggravation, delay, expense, court proceedings, etc., than anyone should have to bear.

We respectfully pray this Court to deny the Government's Petition.

Respectfully submitted,

CHAS. H. EYSTER,
Attorney for Respondent.

I, Chas. H. Eyster, do hereby certify that I have this day mailed a copy of the foregoing Brief and Argument to the Hon. Paul B. Pearlman, Solicitor General of the United States, Washington, D. C., postage prepaid.

This 14 day of September, 1950.

Chas. H. Eyster,
Attorney for Respondent.